[2023] JMSC Civ 168

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV4938

BETWEEN	**FLORENCE DAYES**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for and on behalf of the Claimant

Ms. Jevaughnia Clarke and Mr. Tahir Thompson instructed by Director of State Proceedings for and on behalf of the Defendant

Dates Heard: May 29 & 30, June 2, September 18 & 28, 2023

Civil Practice & Procedure – Negligence – Breach of Duty of Care – Duty to provide a safe system work – Occupier's Liability Act – Breach of Statutory Duty of Care – Credibility of witnesses – Contributory Negligence – Assessment of Damages – Handicap on the Labour Market

PALMER HAMILTON J

BACKGROUND

[1] By way of a Claim Form filed on the 9th day of September, 2013, the Claimant claims against the Defendant for damages for negligence and/or breach of the Occupier's Liability Act and/or breach of contract. The Claimant alleges that on or about the 23rd day of April, 2010, she was in the lawful execution of her duties as a chef under a contract of service with the Government of Jamaica, *vis-à-vis,* the Troja Primary and Junior High School, when as a consequence of the negligent

manner in which the Government of Jamaica executed its operations in the course of its trade, the Claimant was exposed to risk of injury and as a consequence sustained serious personal injury and suffered loss and damage.

[2] Further, or in the alternative, the Claimant claimed against the Defendant to recover damages for breach of contract for that in or about the year 2010, the parties entered into a contract of service whereby it was agreed that in consideration of certain remuneration, the Claimant would provide her services as a chef to the Government of Jamaica, *vis-à-vis,* the Troja Primary and Junior High School. The Claimant alleges that it was an expressed or implied term of the contract that the Government of Jamaica would take all reasonable care to execute its operations in the course of its trade in such a manner so as not to subject the Claimant to reasonably foreseeable risk of injury. In breach of the said contract, the Government of Jamaica has exposed the Claimant to reasonably foreseeable risks of injury as a consequence of which the Claimant has sustained serious personal injury and has suffered loss and damage.

[3] Further, or in the further alternative, the Claimant's claim is against the Government of Jamaica to recover damages for breach of the Occupier's Liability Act. On the 23rd day of April, 2010 the Claimant was lawfully in the execution of her duties as a chef upon premises owned and/or controlled and/or occupied by the Government of Jamaica, namely, the Troja Primary and Junior High School, when as a result of the negligent, unsafe and dangerous manner in which the Government of Jamaica kept and maintained its premises, the Claimant slipped and fell and sustained serious personal injury and has suffered loss and damage.

[4] The Claimant alleged that on the 23rd day of April, 2010 she was performing her duties as a chef when she went to the kitchen area. While she was in the process of carrying a bucket of water into the kitchen, she slipped and fell due to water that was on the floor that spilled from the said bucket. It was further alleged that the floor of the said kitchen was at all material times dangerous and prone to being extremely slippery when wet.

[5] The Defendant, in its Defence, denied the Claimant's allegations and contended that at all material times, the Government of Jamaica executed its operations at the Troja Primary School with due care and attention and that it did not breach its standard of care to ensure that the Claimant was protected from reasonably foreseeable risks at the material time and that it did not cause the Claimant's injuries, loss and damage. It was further contended, in the Defence, that the floor of the kitchen area/canteen is composed of ceramic tiles with smooth non-skid surfaces and that no polish or other sheen products are permitted to be applied to the said floor. Further, the Principal at all material times instructed staff including the Claimant to ensure that a dry surface is to be maintained in the aforementioned canteen/kitchen area and that persons traversing the floor were to wear proper footwear that would not render their movements in the said area potentially unsafe. Additionally, the Defendant averred that the Claimant is assisted by a competent and adequate staff in carrying out her functions, namely an Assistant Cook and a Cleaner. The Defendant maintained that the standard of care to ensure that the Claimant was protected from foreseeable risks was not breached.

SUBMISSIONS

[6] I wish to thank Counsel for their submissions and supporting authorities which provided valuable assistance in deciding the issues. They were thoroughly considered and will be dealt with under each issue below. I also wish to note that I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings.

ISSUES

[7] The issues for my determination are:

(a) Did the Defendant owe a duty of care to the Claimant?

(b) Did the Defendant breach the duty of care, if any, which resulted in the injuries suffered by the Claimant on the 23rd day of April, 2010?

(c) Did the Claimant in any way contribute to the injuries suffered on the 23rd day of April, 2010?

(d) The quantum of damages, if any, to be awarded to the Claimant.

[8] In addition to the abovementioned issues, the question of the credibility of the parties is also an issue to be considered.

LAW & ANALYSIS

[9] I am guided by the words of McDonald-Bishop J who stated in **Alvan Hutchinson v Imperial Optical Limited and Hugh Foreman** (unreported) Suit No. C.L. H 035 of 1999 delivered on September 16, 2005 that-

> *It is the Claimant who must satisfy the Court on a balance of probabilities that they have proven the allegation of negligence against the Defendants. It has to determine which of the accounts put forward by the Claimant and the Defendant is more believable. Credibility plays a pivotal role in this exercise, and the Court in assessing credibility will have due regard to the demeanour of the witnesses.*

[10] The burden of proof rests with the Claimant. She must prove on a balance of probabilities that the Defendant owed her a duty of care, that duty was breached and that the breach resulted in damage to her.

A. *Did the Defendant owe a duty of care to the Claimant?*

[11] It is not in dispute that the Defendant owed a duty of care to the Claimant. It is well established that an employer has a duty at common law to have reasonable care for the safety of its employees. It also includes, the duty to provide competent staff, adequate plant and equipment, a safe place and a safe system of work and adequate supervision. A failure on the part of the employer to fulfil this duty may amount to negligence (see **Davie v New Merton Board Mills Ltd** [1959] 1 All ER 340.

[12] The parties are *ad idem* on the law surrounding a safe system of work. Learned Counsel for the parties relied on several cases which all dealt with what does

providing a safe system of work mean. I see no need to mention all the cases relied on. For ease of understanding, I will rely on Lindo J's summary in **Donna Watson v Couples Ocho Rios Limited T/A Couples Tower Isle** [2020] JMSC Civ 75, where it was stated that:

> *[35] A safe system of work includes the manner in which it is intended that the work is to be carried out, the giving of adequate instructions and the taking of precautions for the safety of workers. Where there is a duty to provide a safe system of work, the duty is not discharged by merely providing it. The employer must take reasonable steps to ensure it is carried out and this involves providing instructions in the system as well as some measure of supervision.*
>
> *[36] The case of **Speed v Thomas & Swift Co. Limited** [1943] KB 557 provides support for the proposition that part of an employer's duty in providing a safe system of work is to provide supervision. At page 567 of the judgment, Lord Greene said:*
>
> > *"...the duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless to their own safety"*
>
> *[37] Under the **Occupiers' Liability Act**, an occupier of premises owes a common duty of care to all his visitors. Section 3(2) provides as follows:*
>
> > *"the common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there"*
>
> *This duty extends to an employee who enters the employer's premises under a contract of employment.*

[13] It is also not in dispute that the Claimant suffered injuries on the 23rd day of April, 2010 while at work. The main issue of contention between the parties is whether the Defendant breached the duty of care owed to the Claimant resulting in her injuries.

B. *Did the Defendant breach the duty of care, if any, which resulted in the injuries suffered by the Claimant on the 23rd day of April, 2010?*

[14] Learned Counsel for the Claimant submitted that there is absolutely no doubt that the School Administration is in breach of this duty and the undisputed facts support this. It was submitted that:

> *(a) The School changed the rough flooring of the kitchen to a floor covered with ceramic tiles. Ceramic tiles by their very nature are slippery when wet;*
>
> *(b) The school was aware of the fact that water did not flow through the pipes of the kitchen on occasions. The School Administration devised no proper and safe system to deal with this but instead compounded the dangerous state of the ceramic tiles by requiring that the Claimant take water from the outside to the kitchen. In this process, she was required to use the very same tiles which were slippery when wet. No safer alternative method of getting water into the kitchen was considered and devised by the School Administration;*
>
> *(c) The School devised a system of getting water in to the kitchen which was likely to get water on the tiles and therefore make them dangerous in the circumstances;*
>
> *(d) No warning signs were erected of the danger involved in the tiles being wet;*
>
> *(e) No special instructions were given and if given were not reinforced in light of the unsafe system of taking water into the kitchen using these ceramic tiles;*
>
> *(f) No safety gear was provided to the Claimant;*
>
> *(g) There was no system in place to ensure that the Claimant always wore safety gears in light of the danger inherent in the tiles becoming wet;*
>
> *(h) Devising a system that was circuitous and defeatist in that the floor of the kitchen was to be let dry, yet the Claimant was required to take water from the outside into the kitchen and traverse the tiles with that water; and*
>
> *(i) If there was a system of the groundsman being tasked with carrying water into the kitchen, then the School Administration was in breach of its own system by permitting and encouraging the Claimant to carry the water into the kitchen.*

[15] Learned Counsel for the Claimant further submitted that it is undisputed that the ceramic tiles which were placed in the kitchen were slippery when wet and not suited for a kitchen. Learned Counsel relied on the case of **Brenda Gordon v Juici Beef Limited** (unreported) Claim No. 2007HCV04212 delivered on April 14, 2010. It was contended that the fact that the slippery and dangerous tiles were brought to the attention of the School Administration, and importantly that the Claimant feared that she might slip and fall, placed a clear obligation under the principles of Employer's Liability and the provision of the Occupier's Liability Act to address and correct this dangerous state of affairs. Learned Counsel further contended that no attempt was made to address and fix the dangerous condition of the tiles prior to the Claimant's fall in 2010. Learned Counsel for the Claimant submitted that no clear safety procedure was established from the evidence led by the Defendant and the system of work devised by the School Administration was dangerous and unsafe in all the circumstances.

[16] On the other hand, Learned Counsel for the Defendant asserted that at all material times the Government of Jamaica executed its operations at the Troja Primary and Junior High School with due care and attention and that it did not breach its standard of care as the Claimant was protected from reasonably foreseeable risks at the material time. Learned Counsel submitted that the school provided the necessary equipment required by the Claimant to carry out her duties as well as an annual allowance as part of her salary for clothing/protective wear. This, Learned Counsel further submitted, satisfied the requirement for the Government of Jamaica to provide adequate plant and equipment.

[17] Learned Counsel for the Defendant contended that the system which was implemented whereby the school's groundsman was tasked with the responsibility of assisting the Claimant with the carrying of water to the kitchen whenever water pressure was low, coupled with the supervision of the Claimant's activities by the School's Bursar satisfied the requirements of the provision of a safe place and a safe system of work and adequate supervision. In relation to the Occupier's Liability Act, it was contended that the Government of Jamaica took such care in

all the circumstances of the case as was reasonable to see that the Claimant was reasonably safe in carrying out her duties as cook by issuing safety directives, providing an annual allowance as part of the Claimant's salary for protective footwear, providing an adequate staff and providing assistance to combat the issue of law water pressure and the need to tote water to the kitchen.

[18] In cross-examination the Claimant stated that she went outside to catch water and it was on her way back to the kitchen that some of the water accidentally spilled from the bucket that she was carrying. The Claimant was clear that the water spilled accidentally and not wilfully. It was not clear from the evidence, whether the Claimant fell immediately after the water was spilled or if she was able to put down the bucket that she was carrying before she slipped and fell. What she stated in her witness statement was that some of the water spilled and she stepped into it and slid. Having had the opportunity of seeing and hearing the witnesses, I found the Claimant to be a truthful and honest witness.

[19] Learned Counsel for the Defendant submitted that how the Claimant fell is a crucial factual issue that needs to be resolved as the cause of the fall is essential to drawing any conclusions as the Claimant is claiming that the slippery nature of the tiles is what caused her to slip and fall. Respectfully, I find no favour with those submissions. As I understand it, the Claimant is claiming that due to the fact that the tiles are slippery when wet she slipped and fell while working. I accept the evidence of the Claimant that she was carrying the bucket of water from the outside when some of the water accidentally spilled and she slipped and fell in same. I recognize that there is a lack of information regarding exactly how soon after the water spilled that she slid and fell, however, in my view that does not affect her credibility.

[20] The witnesses are all agreed that the Claimant did in fact complain about the slippery nature of the tiles when they were wet on numerous occasions. The Claimant complained to her immediate Supervisor who in turn told the Principal of the school. The Principal, in his witness statement stated and maintained in cross-

examination that after he was informed of the Claimant's complaint, he immediately gave safety guidelines/directives to the Claimant and the canteen staff. These guidelines/directives, he further stated, were that the kitchen floor should be kept dry and a non-skid footwear and other protective gear should be worn while working in the kitchen and this was to be overseen by the Claimant's Supervisor, who also gave evidence at the trial.

[21] Both the Claimant and her Supervisor were cross-examined on the shoes that the Claimant wore to work. With her years of experience working in the kitchen, the Claimant was of the view that the shoes she wore, which she described as *"flat black shoes,"* were appropriate for the kitchen and they were not slippery. The Claimant's Supervisor also stated that she was satisfied with the footwear worn by the Claimant and that it was safe for her to walk on the ceramic tiles. The Claimant's own supervisor was satisfied with the shoes that the Claimant wore to work. Even if the said shoes were not appropriate, following the principle in **Speed v Thomas & Swift Co. Limited**, a part of the employer's duty is to provide supervision. I see no evidence before me that the Claimant failed to adhere to the directive or any safety directive issued by the Principal. The Claimant's Supervisor said that she gave general warnings to the Claimant and those warnings mirror the directives/guidelines given by the Principal. The Claimant's Supervisor labelled these warnings as continuous reminders. As even if the Claimant is not breaching the said directives/guidelines she would still be given the directives/warnings. Even if the Claimant was unable to appreciate the risk in wearing what she described as *"flat black shoes"* her employers had a duty to ensure that whatever shoes she wore were non-skid as was directed by the Principal. Simply issuing guidelines/directives with no supervision cannot be considered to be a safe system of work.

[22] It is not in dispute that in 2010 the school was facing water issues. This meant that there were times when there would be no water available in the kitchen and the water had to be brought into the kitchen from the outside. The Principal under cross-examination stated that the groundsman assisted with the disposal of

garbage from the kitchen and to take water to the kitchen when the need arises. He further stated that, when the groundsman is not available to assist with taking water into the kitchen, the Claimant's Supervisor who would also supervise the ancillary staff was responsible to make alternative arrangements whenever she is informed of the need for such arrangements. I accept the evidence of the Claimant's Supervisor that the Claimant herself, at times, would be the one to take the water into the kitchen from the outside. The Claimant's Supervisor stated that she was not aware of the Claimant being in breach of any procedure by transporting the water herself into the kitchen. There was no evidence as to where the groundsman was on the day of the incident and it is clear from the evidence that there was no set procedure in place for when water is to be taken into the kitchen. What is clear from the evidence is that there are times when the Claimant would have to do it herself and I am satisfied that the day of the incident was one of those times.

[23] I accept that the Principal did in fact put in place the guidelines/directives in relation to the carrying out of the kitchen duties. However, the evidence is clear that the Claimant was not in breach of any of those guidelines/directives. Even if I am wrong and the Claimant was in breach, there was no adequate supervision from her employer. I am mindful that the Claimant was the only one who was in the kitchen at the time of the incident. I accept the Claimant's evidence that the tiles in the kitchen were not ideal for the purpose of a kitchen. The Claimant was the one who used the kitchen the most and would be in the best position to comment on the dangers surrounding the tiles. The Principal was able to appreciate the fact that there would be spillage of oil and other ingredients which would allow for the tiles become hazardous and in this case the Principal ought to have appreciated that the slippery nature of the tiling in the kitchen and the presence of water on the floor posed a risk to employees.

[24] There was an obligation on the Claimant's employers to provide a safe system of work. I therefore find on a balance of probabilities that the Defendant failed to provide a safe system of work for the Claimant, which in turn resulted in the injuries

she suffered. The Defendant failed to remedy a system of work which was manifestly unsafe and likely at material times to cause serious injury to the Claimant. Even with the issuing of the directives/guidelines by the Principal, the Claimant continued to complain about the slippery nature of the tiles when it was wet. I also find that, the Defendant failed to take such care as was reasonable to see that the Claimant would be reasonably safe in using the premises for the purpose for which she was invited or permitted to be there.

C. *Did the Claimant in any way contribute to the injuries suffered on the 23rd day of April, 2010?*

[25] The Defendant has claimed that there is contributory negligence on the Claimant's part. The Defendant, in order to establish the defence of contributory negligence, must prove that the Claimant failed to take *"…ordinary care for himself," or, in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a contributory cause of the accident."* (see **Lewis v Denye** [1939] KB 540 and **Caswell v Powell Duffryn Associated Collieries Ltd.** [1940] A.C. 1)

[26] Section 3(1) of the **Law Reform (Contributory Negligence) Act,** states that-

> *"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damages".*

[27] There has to be evidence that the Claimant did not act as a reasonable and prudent man in the circumstances and he ought to have foreseen that their actions or omissions might cause harm to themselves. The Claimant herself ought to have recognized that she should have taken care for her own safety. Even though I accept that the water was spilled accidentally and not wilfully, the Claimant should have appreciated the risk in continuing to walk while the floor was wet. Especially since she was aware the ceramic tiles were slippery when wet. I therefore find that

the Defendant cannot be held to have been wholly responsible for the incident that occurred on the 23rd day of April, 2010. I find that the Claimant's injuries were partly due to her own negligence and is therefore 49% responsible for her injury.

D. *The quantum of damages, if any, to be awarded to the Claimant*

[28] Having found that the Defendant is partially liable for the injuries sustained by the Claimant, I now move on to the issue of damages. The particulars of injury were set out as follows:

- *Pain to the left knee*
- *Pain to the lower back*
- *Pain to the right ankle*
- *Lumbar Spine Regional Grid Spine Impairment of 3%*
- *Knee joint impairment of 2% to the whole person*
- *Ankle joint impairment of 1% to the whole person*

[29] The Claimant referenced two (2) medical reports. However, Learned Counsel for the Defendant objected to one of the reports being tendered into evidence. As a consequence of that, the document was marked for identification and the issue surrounding that medical report was left for submissions. Having considered the submissions for the parties, I am inclined to agree with the submissions of Learned Counsel for the Defendant. The Doctor was not appointed as an expert, nor was an application made at the trial for the Doctor to be appointed as an expert. Even though the medical report of that Doctor was included in the Claimant's Notice of Intention to Tender in Evidence Hearsay Statement made in Documents, the Defendant's filed a Notice of Objection to that. Respectfully, I cannot agree with Learned Counsel for the Claimant that there are no legal obstacles to the admission of the said medical report. From as early as the filing of the Defence, the Defendant required the maker of the said report to attend for cross-examination. The Doctor was not called as a witness and therefore the contents of the report were not challenged. It is my view that the Medical Report dated January

14, 2011 and prepared by Dr. Karl P Exell ought not to be admissible. Additionally, the medical report does not comply with Rules 32.13 (1) and (2) of the Civil Procedure Rules 2002, as amended.

[30] In these circumstances, the Medical Report dated May 29, 2013 and prepared by Dr. Adolfo Mena is the only expert evidence and the one that I will be relying on. In that report Dr. Mena diagnosed the Claimant with Lumbosacral Strain, Severe Osteoarthritis both knees and chronic right ankle sprain. Dr. Mena treated the Claimant by means of analgesics, anti-inflammatories and referred her for physiotherapy and home programmed exercises along with lifestyle changes. Under the section intituled "Assessment and Impairment," Dr. Mena stated that the Claimant suffered a Permanent Partial Impairment of 6% of the whole person in relation to the fall she had on April 23, 2010 based on the following:

> *Lumbar Spine Regional Grid Spine Impairment with chronic recurrent low back pain or strain symptomatic degenerative disc disease, which is classified with class 1; grade modifier 1; which has a measureable impairment rating of 3% of the whole person.*
>
> *Knee Regional Grid Lower Extremity Impairment with primary knee joint arthritis which is classified with class 1; grade 1 modifier; which has an impairment rating of 5% of her left lower extremity. This represents 2% of the whole person.*
>
> *Foot & Ankle Regional Grid Lower Extremity Impairment with chronic right ankle strain which is classified with class 1; grade 1 modifier; which has an impairment rating of 1% of her right lower extremity. This represents 1% of the whole person.*

[31] The Claimant maintained that she injured her right knee and right ankle. However, the report of Dr. Mena makes reference to the left knee. The Claimant in cross-examination maintained that she injured her right knee and right leg and that the Medical Report of Dr. Mena would be a mistake in relation to the left knee. The Claimant has always maintained that the injuries she suffered from the fall on April 23, 2010 were to her right knee, right ankle and lower back. In my view, the medical report does not contradict the evidence of the Claimant. Dr. Mena's diagnosis does mention both knees and he physically examined both knees and even in follow up

visits the Claimant still maintains that she still feels pain in her right knee. However, I will agree with Learned Counsel for the Defendant that the injuries the Court should consider ought to be the ones that the Claimant has maintained that she received from the fall on April 23, 2010.

(1) Special Damages

[32] The particulars of special damages were particularized as follows:

(i) Medical Expenses (and cont.)	*$20,000.00*
(ii) Transportation Expenses (and cont.)	*$5,000.00*

[33] It is trite law that every item of special damages must be specifically pleaded and proved, however the Court may accept and rely on oral evidence. In such a case, justice may demand that an award should be made but there must be cogent facts and circumstances available to the Court in order for it to exercise flexibility. (see **Central Soya of Jamaica Limited v Freeman** (1985) 22 J.L.R. 152, **Caribbean Cement Company Limited v Freight Company Management Limited** [2016] JMCA Civ 2, **Attorney General of Jamaica v Tanya Clarke (*nee* Tyrell)** (unreported) Suit No. C.L. 2000/C164 delivered December 20, 2004 and **Julius Roy v Audrey Jolly** [2012] JMCA Civ 53). I agree with the submissions of Learned Counsel for the Defendant that the only evidence provided was in relation to the medical report. It seems to me as if the claim relating to the transportation costs was abandoned as no evidence was elicited from the Claimant in relation to that. The Claimant is therefore only entitled to recover the sum of **TWENTY THOUSAND DOLLARS ($20,000.00)** for the medical report of Dr. Adolfo Mena.

(2) General Damages

[34] Learned Counsel for the Claimant relied on the cases of **Marie Jackson v Glenroy Charlton and George Harriott** (unreported) Suit No. C.L.J. 113 of 99 delivered on May 4, 2001 which was cited in Khan's Volume 5 page 167 and **Janice Gordon v The Statistical Institute of Jamaica** [2023] JMSC Civ 53. Based on those

cases, Learned Counsel for the Claimant submitted that a median sum of $7,500,000.00 is appropriate in the circumstances. It was further submitted that paragraph 14 of the Claimant's witness statement establishes the Claimant's inability to work in the way that she used to and the medical evidence is corroborative of this. Therefore, there is no question that the Claimant has sustained handicap on the labour market. Reliance was placed on the cases of **Icilda Osbourne v George Barned, Metropolitan Managemnet Transport Holdings Ltd and Owen Clarke** (unreported) Claim No. 2005HCV294 delivered February 17, 2006 and **Robert Johnson v Tankweld Construction Company Limited** [2013] JMSC CIVIL 3. Learned Counsel for the Claimant submitted that an award within the range of $1,500,000.00 to $2,000,000.00 is appropriate in the circumstances.

[35] On the other hand, Learned Counsel for the Defendant submitted that an appropriate award would be $2,000,000.00, which is to be reduced by 50% owing to the fact that the Claimant contributed to her own injuries. She relied on the following cases: **Dawnette Walker v Hensley Pink** (unreported) Suit No. W123/200 delivered December 7, 2001, **Sandra Morgan v Wayne Ann Holdings Limited (t/a Super Plus Food Store Ltd.)** (unreported) Claim No. 2001/M-130 delivered on May 29, 2009, **Donna Watson v Couples Ocho Rios Limited T/A Couples Tower Isle** [2020] JMSC Civ 75 and **Mobrey Lewis v Everod Lewis** (unreported) Claim No. 2006HCV02643 delivered on November 19, 2007. No submissions were made in relation to handicap on the labour market.

[36] The appropriate starting point would be to assess the damages for the Claimant's pain and suffering. The claimants in the cases cited by Learned Counsel for both the Claimant and the Defendant suffered more serious injuries than the Claimant in the case at bar. I am mindful of the aspect of Dr. Mena's medical report that speaks to the follow-up visit with the Claimant. Dr. Mena stated that the Claimant said she was still with lower back, right knee and right ankle pain in March 2011. It was further stated that the Claimant's back pain was getting worse especially sitting for long periods, washing clothes or lifting anything heavy. The Claimant

complained that she can't stand for too long, she feels cramps sometimes over her right knee and right leg, her right ankle is still with pain across the ankle joint and it also states that she was unable to do the MRI because of financial problems. However, there is a MRI Report dated July 25, 2013 which stated the following impressions: sinus tarsi syndrome, mild tensosynovitis both medially and laterally and small ganglion cyst adjacent to the talonavicular articulation.

[37] I found the case of **Anthony Gordon v Chris Meikle and Esrick Nathan**, Khan, Vol. 5, page 142, to be useful where the court, in July 1998, awarded $220,000.00 to the Claimant who was diagnosed with cervical strain, contusion to the left knee and lumbosacral strain and assessed with a permanent partial disability rating of 5%. That figure updates to $1,522,539.68 using the CPI for July, 2023 (130.8).

[38] The claimant in **Lenroy Lee v Commissioner of Police** (unreported) Suit No. C.L. 1988/J131 cited in Harrisons' Case Notes at page 375 was diagnosed with a sprained ankle and he was awarded $8,000.00 in November 1991. That figure updates to $237,818.18 using the CPI for July, 2023. Even though the Claimant in the case at bar suffered more serious injuries than the claimant in **Lenroy Lee**, I still found the award made to be useful.

[39] I also found the case of **Kavin Pryce v Raphael Binns and Michael Jackson** [2015] JMSC Civ. 96 to be useful. In that case the claimant was diagnosed with cervical strain, lower back strain, soft tissue injuries to left thigh and left knee sprain. The claimant was reviewed by a doctor a month after the diagnosis was made and found that the claimant showed fair recovery from his injuries, he is expected to experience occasional episodes of neck and lower back pain for the next three month's time and that the claimant would benefit from continuing physiotherapy exercises. An award of $1,500,000.00 was made in May 2015 which updates to $2,284,051.22.

[40] In the case of **Brenda Gordon**, the claimant was diagnosed as having 13% permanent partial disability of the whole person from mechanical back pain which

she suffered following a slip and fall at her workplace. The medical doctor opined that the claimant will continue to have mechanical back pain and her pain would vary in severity. An award of $4,600,000.00 was made which updates to $9,896,052.63 using the CPI for July, 2023. Therefore, any award to be made would be significantly less than that made in **Brenda Gordon**.

[41] I am mindful that there is no evidence of the Claimant in the case at bar doing the home programmed exercises and no evidence of lifestyle changes as recommended by Dr. Mena. With no evidence of that, the Court has to bear in mind that there is the possibility that the Claimant's injuries could have possibly improved. A claimant who has suffered loss has a duty to take reasonable action to minimize the amount of loss suffered (see **British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited** [1912] AC 673).

[42] In those circumstances, I am of the view that an award similar to that made in **Kavin Pryce** would be appropriate. Campbell JA in **Beverley Dryden v Winston Layne** (unreported) SCCA No. 44/87 stated that, *"Personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."* With that in mind, even though the Claimant in **Kavin Pryce** was not diagnosed as having any permanent partial impairment, the injuries suffered by that claimant are more comparable with the injuries suffered by the Claimant in the case at bar. I am also mindful that the defendants in **Kavin Pryce** were absent and unrepresented. The case of **Anthony Gordon**, even though it is of some antiquity, still does provide use in making an award. It is therefore my judgment that an appropriate award in the circumstances would be **TWO MILLION FIVE HUNDRED THOUSAND DOLLARS ($2,500,000.00).**

[43] Sykes J in **Andrew Ebanks v Jephter McClymount** Claim No. 2004HCV02172 delivered on March 8, 2007 stated in relation to selecting the appropriate method

for determining an appropriate award for damages for handicap on the labour market/loss of earning capacity that:

> *From the cases, the principles that can be derived in order to determine which method is used are as follows. In setting out these principles I shall also address the third objective which is, the factors that determine the size of the award, particularly if the lump sum method is used:*
>
> *(a) If the claimant is working at the time of the trial and the risk of losing the job is low or remote, then the lump sum method is more appropriate and the award should be low (**Ashcroft v Curting**; **Gladys Smith v The Lord Mayor**);*
>
> *(b) If the claimant is working at the time of the trial and there is a real or serious risk of losing the job and there is evidence that if the current job is lost there is a high probability that the claimant will have difficulty finding an equally paying or better paying job then the lump sum method may be appropriate depending, of course, when this loss is seen as likely to occur. The size of the award may be influenced by time at which the risk may materialize. Admittedly, this is a deduction from what Lord Denning said in **Cook v Consolidated Fisheries**;*
>
> *(c) It seems that if the claimant is a high income earner the multiplier/multiplicand method may be more appropriate. This latter point seems to be a principle that is emerging from the Jamaican case of **Cambell v Whylie**. This proposition is derived from my attempt to reconcile Campbell and Consolidated Fisheries. Both cases are very close in terms of the actual evidence before the court, the main difference being the earning power of the medical doctor vis a vis a young man working on a trawler and then later a lorry driver.*
>
> *(d) The lump sum is not arrived by reference to and comparison with previous cases (**Nicholls v National Coal Board**);*
>
> *(e) If the claimant is not working at the time of the trial and the unemployment is the result of the loss of earning capacity then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment or if employment is found by the job is very likely to be less well paying than the pre-accident job, assuming that the person held a job. The reason is that the financial impact of the loss of earning capacity would have begun already and the likelihood of the financial impact being reduced by the claimant finding employment would be virtually none existent;*

> *(f) If the person has not held a job but there is evidence showing the person is unlikely to work because of the injuries, then the lump sum method is to be used (**Joyce v Yeomans**).*

[44] I am guided by the case of **Dovan Pommells v George Edwards et al** Khans Vol 3, pp.138-144 relied on by T. Hutchinson Shelly, J in **Janice Gordon**, where she stated that:

> *To succeed in obtaining an award under the head of Handicap on the Labour Market, there must be evidence of the following;*
>
> *(a) the claimant's earnings at the time of the trial,*
>
> *(b) evidence of loss of these earnings,*
>
> *(c) evidence of difficulty finding alternative employment and*
>
> *(d) evidence that any subsequent employment would result in diminution of earnings.*

[45] No evidence was led in relation to the Claimant's income after the accident. She stated that she does not have a steady job and she assists her brother overseas *"…by feeding or counting plants or baby sitting."* No figure was given in relation to show how much she makes or even how often she is paid from the assistance she gives to her brother. However, she gave her income while working at the School as $7,604.00 weekly, which she stopped receiving about September 2010. The Claimant further stated that her loss of earnings to date is $4,562,400.00. While, it is clear that the Claimant suffered injuries which in turn affected her ability to work. As someone who works in the kitchen, she would be required to stand for long periods at a time and it also requires a lot of movement. I thoroughly considered this, especially in light of what she stated in her follow-up visit to Dr. Mena. I also bore in mind that with the injuries suffered by the Claimant she would be at a disadvantage being placed back on the labour market. However, there is no evidence of difficulty finding alternative employment or no evidence of a diminution of earnings in subsequent employment.

[46] In light of that, I was unable to find any justification in making an award for this head of damages. I am also of the view that, not enough evidence has been led in

relation to the loss of earnings as stated by the Claimant, therefore, no award will or can be made in respect of same. To do so would mean that the Court will embark on an exercise in futility, and sheer speculation.

ORDERS & DISPOSITION

[47] Having regard to the forgoing, these are my Orders:

(1) Judgment for the Claimant with contributory negligence assessed at 51:49.

(2) Special damages awarded in the sum of **TWENTY THOUSAND DOLLARS ($20,000.00)** with interest at a rate of 3% per annum from April 23, 2010 to September 26, 2023, to be apportioned 51:49.

(3) General damages awarded in the sum of **TWO MILLION FIVE HUNDRED THOUSAND DOLLARS ($2,500,000.00)** with interest at a rate of 3% per annum from September 9, 2013 to September 26, 2023, to be apportioned 51:49.

(4) 51% of the costs to the Claimant to be taxed if not agreed.

(5) Claimant's Attorneys-at-Law to prepare, file and serve Orders made herein.